United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1085

To be argued by
MICHAEL S. DEVORKIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1085

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSE ARAUJO, JOHN DOE, a/k/a "NENO," and JORGITA RIVERA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.
United States Attorney for the Southern District of New York, Attorney for the United States of America.

MICHAEL S. DEVORKIN,
FREDERICK T. DAVIS,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Statement of Facts 3

The Government's Case 3

The Defense Case 10

ARGUMENT:

POINT I—The Evidence Of Prior Similar Acts Was Properly Received As Probative Of The Existence Of The Conspiracy And On The Issues Of Knowledge And Intent 11

POINT II—The Prosecutor And The Judge Did Not Vouch For The Credibility Of The Government's Witnesses 22

POINT III—The Court's Instructions Were In All Other Respects Correct 29

A. The Court Did Not Comment on Araujo's Failure to Testify 29

B. The Court did not Invade the Jury's Province to Determine the Facts Nor did it Demonstrate Belief in Araujo's Guilt 31

POINT IV—The Sentencing Of Appellants Did Not Punish Them For Going To Trial And Was In All Respects Proper 34

CONCLUSION 39

TABLE OF AUTHORITIES

Cases:

PAGE

Alfred v. *United States*, 282 U.S. 687 (1931) 24

Baker v. *United States*, 412 F.2d 1069 (5th Cir. 1969), *cert. denied*, 396 U.S. 1018 (1970) 38

Cupp v. *Naughten*, 414 U.S. 141 (1973) 27, 29

Dorszynski v. *United States*, 418 U.S. 424 (1974) .. 35

Lawn v. *United States*, 355 U.S. 339 (1958) 25

Lutwak v. *United States*, 344 U.S. 604 (1953) 15

Quercia v. *United States*, 289 U.S. 466 (1933) 28

Scott v. *United States*, 419 F.2d 264 (D.C. Cir. 1969) 38

Thomas v. *United States*, 368 F.2d 941 (5th Cir. 1966) 38

United States v. *Aloi*, 511 F.2d 585 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3344 (Dec. 8, 1975) 24, 25

United States v. *Andreadis*, 366 F.2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967) 29

United States v. *Benter*, 457 F.2d 1174 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972) 24

United States v. *Bernstein*, — F.2d —, Slip op. 6631 (2d Cir., March 4, 1976) 33

United States v. *Birnbaum*, 373 F.2d 250 (2d Cir.), *cert. denied*, 389 U.S. 837 (1967) 28, 29

United States v. *Brettholz*, 485 F.2d 483 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974) 16, 18

United States v. *Brown*, 479 F.2d 1170 (2d Cir. 1973) 35

United States v. *Buckner*, 108 F.2d 921 (2d Cir.), *cert. denied*, 309 U.S. 669 (1940) 15

PAGE

United States v. *Byrd*, 352 F.2d 570 (2d Cir. 1965) 17

United States v. *Campanile*, 516 F.2d 288 (2d Cir. 1975) 16

United States v. *Cianchetti*, 315 F.2d 584 (2d Cir. 1963) 26

United States v. *Cohen*, 489 F.2d 945 (2d Cir. 1973) 15, 18, 21

United States v. *Colasurdo*, 453 F.2d 585 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972) 14, 15

United States v. *Costello*, 352 F.2d 848 (2d Cir. 1965), *vacated on other grounds*, 390 U.S. 39 and 201 (1968) 15

United States v. *Cuevas*, 510 F.2d 848 (2d Cir. 1975) 33, 34

United States v. *Curcio*, 279 F.2d 681 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960) 33

United States v. *DeAngelis*, 490 F.2d 1004 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974) 25

Untied States v. *DeCicco*, 435 F.2d 487 (2d Cir. 1970) 17, 18

United States v. *Del Purgatorio*, 411 F.2d 84 (2d Cir. 1969) 22

United States v. *DeSisto*, 289 F.2d 833 (2d Cir. 1961) 33

United States v. *Fernandez*, 480 F.2d 726 (2d Cir. 1973) 33

United States v. *Floyd*, 496 F.2d 982 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974) 38

United States v. *Freedman*, 445 F.2d 1220 (2d Cir. 1971) 18

PAGE

Untied States v. *Gerry*, 515 F.2d 130 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3358 (Dec. 15, 1975) 16

United States v. *Gocke*, 507 F.2d 820 (8th Cir. 1974), *cert. denied*, 420 U.S. 979 (1975) 18

United States v. *Goldstein*, 120 F.2d 485 (2d Cir. 1941), *aff'd*, 316 U.S. 114 (1942) 28

United States v. *Greenberg*, 268 F.2d 120 (2d Cir. 1959) 25, 28

United States v. *Haynes*, 291 F.2d 166 (2d Cir. 1961) 28

United States v. *Herndon*, 525 F.2d 208 (2d Cir. 1975) 38

United States v. *Isaacs*, [illegible] F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) 25, 27

United States v. *Johnson*, 382 F.2d 280 (2d Cir. 1970) 17

United States v. *Koss*, 506 F.2d 1103 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975) 24, 25

United States v. *La Sorsa*, 480 F.2d 522 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973) 24, 28

United States v. *La Vecchia*, 513 F.2d 1210 (2d Cir. 1975) 34

United States v. *Lee*, 506 F.2d 111 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1002 (1975) 26

United States v. *Leitner*, 312 F.2d 107 (2d Cir. 1963) 18

United States v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975) 16, 19

United States v. *Malcolm*, 432 F.2d 809 (2d Cir. 1970) 36, 38

United States v. *Mitchell*, 392 F.2d 214 (2d Cir. 1968) 38

United States v. *Natale*, 526 F.2d 1160 (2d Cir. 1975) 14

PAGE

United States v. *Nathan*, 476 F.2d 456 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973) 15

United States v. *Nazzaro*, 472 F.2d 302 (2d Cir. 1973) 33

United States v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975) 14, 15, 16, 21

Untied States v. *Pinto*, 503 F.2d 718 (2d Cir. 1974) 34

United States v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970) 16

United States v. *Rivera*, 519 F.2d 519 (2d Cir. 1975) 24

United States v. *Rothman*, 463 F.2d 488 (2d Cir.), *cert. denied*, 409 U.S. 956 (1972) 22

United States v. *Salazar*, 485 F.2d 1272 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974) 35

United States v. *Santiago*, 518 F.2d 1130 (2d Cir. 1976) 27, 29

United States v. *Stidham*, 459 F.2d 297 (10th Cir.), *cert. denied*, 409 U.S. 868 (1972) 35

United States v. *Tateo*, 214 F. Supp. 560 (S.D.N.Y. 1963) 38

Untied States v. *Torres*, 519 F.2d 723 (2d Cir. 1975) 14

United States v. *Tramunti*, 513 F.2d 1087 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3201 (Oct. 7, 1975) 34

United States v. *Velazguez*, 482 F.2d 139 (2d Cir. 1973) 34

United States v. *Vermeulen*, 436 F.2d 72 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971) ... 36, 38

United States v. *Wiley*, 519 F.2d 1348 (2d Cir. 1975) 34

PAGE

Statutes:

18 U.S.C. § 371 2

18 U.S.C. § 471 2

18 U.S.C. § 473 2

18 U.S.C. § 474 2

Rules:

Fed. R. Crim. P. 30 21

Fed. R. Evid. 404 12

Fed. R. Evid. 404(b) 16

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1085

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSE ARAUJO, JOHN DOE, a/k/a "NENO," and JORGITA RIVERA,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Jose Araujo, Rafael Hichez, a/k/a "Neno," and Jorgita Rivera appeal from judgments of conviction entered on February 18, 1976, in the United States District Court for the Southern District of New York after a thirteen day trial before the Honorable Irving Ben Cooper, United States District Judge, and a jury.

Superseding Indictment 75 Cr. 936, filed on September 25, 1975, charged Araujo, Hichez and Rivera and twelve other persons in nineteen counts with a successful conspiracy to manufacture and distribute $3,000,000 in counterfeit United States currency. Count One charged all three appealing defendants and others with conspiracy to make negatives and plates of United States federal reserve notes and to manufacture and distribute counter-

feit United States currency with intent to defraud, in violation of Title 18, United States Code, Section 371. Count Two charged all three defendants with making negatives and plates of United States currency in violation of Title 18, United States Code, Section 474. Count Three charged all three defendants with manufacturing $3,000,000 in counterfeit United States currency with intent to defraud, in violation of Title 18, United States Code, Section 471. Count Four charged all three defendants with receiving and transferring $3,000,000 in counterfeit United States curency with fraudulent intent, in violation of Title 18, United States Code, Section 473. Counts Nine and Twelve charged Rivera and Hichez respectively, with receiving $85,000 and $20,000 in counterfeit United States currency with fraudulent intent, in violation of Title 18, United States Code, Section 473.*

The trial of Araujo, Hichez and Rivera and co-defendants, Felix Irrizarri and Antonio Correa, a/k/a "Chulerlia" commenced on January 5, 1976. During trial, on January 15, Irizarri pleaded guilty to Counts One and Seventeen. On January 19, on the Government's motion an acquittal of Correa was granted.** On January 21, 1976, the jury convicted the remaining defendants of all counts charged against them. On February 18, 1976, the Court sentenced Araujo and Hichez to concurrent terms of 1 year, and 3 years, respectively, on each of the Counts for which they had been convicted, and Rivera to concurrent terms of five years on Counts One

---

* The remaining counts in the indictment related to defendants not now appealing.

** The acquittal was required when the Government determined during trial that it could not use its sole witness against Correa. (Tr. 1164-68). "Tr." refers to the trial transcript; "GX" refers to Government Exhibits.

and ten years on Counts Two, Four and Nine. All of the appellants are currently serving their sentences.

Of the remaining eleven defendants, Irrizarri pleaded guilty during trial and testified for the Government. Manuel Adames, Rafael Jacobo, and Freddy Almeida pleaded guilty to various counts before trial and testified for the Government. On March 3, 1976, Adames was sentenced to two years imprisonment; Jacobo to two years, execution of sentence suspended, and two years probation; Almeida and Irrizarri to two years, eighteen months suspended and eighteen months probation. All other defendants were fugitives at the time of the trial.

Statement of Facts

I. The Government's Case

Beginning in January, 1975, more than fifteen citizens of the Dominican Republic living in New York City began to manufacture and distribute approximately $3,000,000 in counterfeit United States currency. The Government's case was based principally on the testimony of three co-conspirators, Manuel Adames, Rafael Facundo and Freddy Almeida, who in turn were corroborated by the testimony of two other co-conspirators, Rafael Jacobo and Felix Irrizarri, numerous Secret Service Agents and substantial documentary evidence. The proof established that Rivera was a principal financier for the scheme, and that Hichez and Araujo were general helpers. Rivera and Hichez received $40,000 and $20,000 counterfeit currency, respectively.

The efforts to distribute counterfeit money began in November and December, 1974, when Adames, Jacobo, Irrizarri, Almeida and Facundo together purchased coun-

terfeit money, which they then passed at various locations in the New York area. See, e.g., Tr. 47-54, 60-71, 73-78. In January, 1975, they turned to a new source for their counterfeit money. Rivera introduced Adames to Angel Molina and Luis Rodriguez as a source of counterfeit money, and, with Rivera's help, Adames bought counterfeit money from them. (Tr. 131-153) Rivera asked Adames for a fee for his help, but had to settle for $50 from Rodriguez (Tr. 183-84), and then gave Adames $50 counterfeit to pass for him. (Tr. 198-99) Facundo passed the $50 counterfeit bill for Rivera. (Tr. 836-37) Adames, Facundo, Almeida, Jacobo and Irrizarri passed the counterfeit money which Rivera helped them get from Molina and Rodriguez. However, on a subsequent occasion, Molina and Rodriguez cheated them out of $1700 which was to buy more counterfeit money. To recoup this loss, Adames and the others stole a pickup truck belonging to Rodriguez. Adames then agreed to join Rodriguez and Molina in their plans to manufacture a substantial amount of counterfeit currency. He sold the truck for $800, and gave the money to Rodriguez and Molina to use to manufacture the counterfeit money. (Tr. 187-92, 201-17, 830-46, 1222-23)* Adames brought Facundo and Almeida into the plan as an electrician and finder of investors, respectively. Irrizarri and Jacobo were told they would get their money back but were not told about the manufacturing. Adames, Rodriguez and Molina solicited the help of Caesar, a printer, and Papito, a photographer. Almeida helped them find one investor and Rivera was brought in as another investor, in exchange for the promise of counterfeit money when the enterprise was completed.

---

* Rivera's glib assertion that Rivera had nothing to do with these early purchases and distributions of counterfeit money (Brief at 20) is totally incorrect. As set forth, *supra*, he was clearly responsible for some of it, and he was instrumental in bringing Adames, Rodriguez and Molina together and therefore setting in motion the manufacturing efforts.

After a number of early planning meetings, it became clear that a camera would have to be bought, so Adames, Molina and Rodriguez went to see Rivera. They told him they needed more money in order to make the plates to make the counterfeit money, and Rivera said he would try to raise some money. (Tr. 258-60) The next day Rivera gave Rodriguez $600 to help buy the camera. (Tr. 262-63) The camera was bought in March, 1975, and taken to 611 W. 156th Street, Manhattan, and installed in an empty basement room near Araujo's apartment in the building where Araujo was the superintendent.* (Tr. 861-66; GX 16)

Araujo watched its installation and showed Facundo where to get electrical current to use for the camera. (Tr. 863, 865-66) Later Araujo watched Papito make the negatives, and even went to try to obtain some new bills to use to make more negatives. (Tr. 868, 873-74) Araujo had a special key for that apartment (Tr. 952, 983-84), and generally helped maintain security at the basement for about two weeks while the negatives were being made. (Tr. 694, 876) He also kept an eye on Papito in order to make sure that Papito did not double-cross everyone and disappear with the negatives he was making when they were finished. (Tr. 351, 354-56) After a day's work was completed, Papito gave Araujo a package containing "the negative, lenses, conveniences, all the different things that he had to make the negatives." (Tr. 385-87, 401, 875, 878-79, 983) Araujo continued to observe the efforts to make more negatives, took an interest in their quality and completion, and talked with Facundo and others about how much counterfeit money they ex-

---

* Burt Brander, an employee of Bomze Photographic Equipment Company, testified about the purchase of this camera, and his subsequent dealings with the purchasers, and he identified the camera (GX 14) and a receipt for a pump which Facundo picked up to use with the camera. (Tr. 870-71, 1074-82; GX 53)

pected to be paid for their work. (Tr. 274, 276-77, 312-15, 337-38, 373-74, 873, 876-77) During the course of the work making negatives in that basement room, Adames informed Rivera that the work there was going well. (Tr. 883-84)

Of course, in addition to a camera, it was necessary to obtain a printing press. Adames, Almeida and Rivera and others went with Rodriguez to help pick up the printing press, which was then taken to another basement apartment on Coster Avenue, the Bronx. (Tr. 379-384, 1226-1229) However, on March 24, 1975, Adames and Facundo returned to Araujo's building only to discover Papito and Rodriguez running away and Araujo's brother telling them to escape because "the Federals are here." (Tr. 885-86) Hichez' participation in the conspiracy began at this point. He was told that the police had taken the camera and perhaps the negatives and that someone would have to go to look for the negatives. (Tr. 407-08, 1231) On March 25 or 26, 1975, Adames, Rodriguez, Molina, Facundo, Hichez and others met in a parking lot, and Hichez went to summon Araujo, and to see if any police were at his building. (Tr. 409-11, 889) He returned and told everyone that Araujo was expected soon; Rodriguez and Facunda then borrowed Hichez' car and brought Araujo to the meeting, where Araujo told those present, including Hichez, that the police had come and taken everything including the negatives.* (Tr.

---

* To protect himself and the others, Araujo falsely told the police that the camera was being used to make pornography. (Tr. 425-26) The negatives (GX 33A-C) and other photographic materials (GX 32A-G, I-K, M-O, R-U, W-Y) which were in the apartment in Araujo's building were introduced in evidence. (Tr. 304-06, 338-45, 385-87, 879-82) These items and the camera (GX 14 and 15) were found there by the police and Secret Service. (Tr. 1084-89, 1186-87) Certain negatives were just where Rodriquez told Araujo, Facundo, Adames and the others that they had been thrown. (Tr. 890)

423-27, 889-92) Araujo told Rodriguez, Facundo, and Adames that if they continued the effort to make counterfeit money, he would invest $1000. (Tr. 427, 892) At the conclusion of the meeting, Hichez took Araujo home. (Tr. 427)

Thereafter, further meetings were held, some of which Hichez attended, and plans were developed to continue the counterfeiting work. (Tr. 428-33) Since the camera was seized by the police (Tr. 426), the group needed more money to buy a new camera and other supplies. In the course of discussions about how to raise more money to continue the work, Hichez offered to get $300-400, which he later gave to Molina. (Tr. 433, 444, 466, 925-26) However, the principal sources of financing were Rivera, Juan Mejia and Cristobal. Adames, Molina and Rodriguez went back to Rivera, who gave them $1300 more to continue the counterfeiting. (Tr. 438-39, 448-50, 463-65, 927) Juan Mejia, both before and after the first camera was seized, invested more than $2600, taken out of his bank accounts (GX 26, 27), in part on the security he got from pawn shop receipts (GX 28A, 28B) for Rodriguez' jewelry. (Tr. 365, 368-74, 439-40, 450-51, 929, 1060-63, 1188, 1223-25). Finally, Cristobal, a/k/a Luis Rivera, sold his car and gave the proceeds to Rodriguez. (Tr. 429-36, 442-43, 579-82, 928, 1001-03; GX 29A, 29B) With all of this money, Rodriguez went to Nu Arc Camera Co. and bought another camera for $2700. (Tr. 442, 452-58, 985-95; GX 18-21)*

After the printing press and second camera were installed at Coster Avenue, Hichez drove Rodriguez to buy supplies for Papito to use with the camera, and

---

* Joseph Fontanella, the manager of Nu Arc Camera Co., testified about the purchase of this camera from his store. (Tr. 985-95)

brought these supplies to Coster Avenue and placed them in the room where the camera was installed. (Tr. 459-61) New negatives and plates were made and the money was printed there in the beginning of April, 1975.* Hichez also went to see the Coster Avenue operation two or three times to offer his services, and on one occasion Rodriguez showed him a sheet of counterfeit money that had been made. (Tr. 472-74, 916) Once, Hichez was given a few sheets of the counterfeit money to store in his own apartment. (Tr. 915) When the $3,000,000 was finally printed, Hichez helped Adames, Rodriguez, Papito and Caesar move the counterfeit money from Coster Avenue to an apartment on Bruckner Blvd., where it was divided.** Hichez watched as the money was counted and divided into piles. He was given $20,000 counterfeit for his help. (Tr. 478-82, 918-19) Rivera received about $40,000, and others' shares varied from $1,000 for Almeida to $400,000 for Adames, and somewhat more for Rodriguez.

Apparently, Rivera did not get his share of counterfeit money immediately, because a few days later Rivera went looking for Rodriguez to get his share of the counterfeit money. (Tr. 582, 923-24, 1235) Two days after that Rivera rejected Rodriguez' offer of only $40-45,000 counterfeit, because he wanted more. (Tr. 583, 923-949). Finally, a day or so later, Rivera accepted $40,000 counterfeit from Rodriguez.

After receiving his share of counterfeit money, Rivera sold at least some of it. Around April 20, 1975, a man called Dominguito told Adames and Almieda that he was looking for Rivera because Rivera had sold him poor

---

* The Secret Service later found counterfeit paraphernalia at this apartment. (Tr. 1197-99; GX 350)

** At this time Adames and Facundo bought themselves a paper cutter. (Tr. 493-94, 922, 1188; GX 22)

quality counterfeit money.* (Tr. 588-90, 1236) About two months later, Almeida took a man named Jose to Rivera, and Rivera sold him about $2300 counterfeit for $800. (Tr. 1236, 1238-39)

The other conspirators also began to sell their shares of the $3,000,900. In April, Adames introduced Caesar and Papito to Victor Marte, so they could sell Marte their counterfeit money. Marte had been selling counterfeit money to Adames in November and December, 1974.** (Tr. 503) Adames gave $2300 counterfeit to Jacobo, which he sold to Agent Simon, and Adames, Jacobo and Irrizarri were arrested on April 16, 1975, when they tried to sell Agent Simon $32,990 counterfeit.*** (Tr. 504, 1114-24; GX 40, 44)

Molina was arrested in Santo Domingo, Dominican Republic on May 2, 1975, with $22,400 counterfeit. (Tr. 750-59; GX 52) Rodriguez was arrested on May 15, 1975, and $10,000 counterfeit and a paper cutter were seized from his person, and $4510 counterfeit from his car. (Tr. 1103-06, 1201-03; GX 45, 46, 47) Finally, Agent Vezeris seized $1,271,120 counterfeit, negatives and plates of Federal Reserve Notes, and counterfeit paraphernalia from an apartment at 327 W. 89th Street, New York City. (Tr. 1249-52; GX 50A-C, 51) All of his counterfeit money was analyzed by Agent Lightsey, an expert in printing and counterfeiting who works in the

---

* On August 8, 1975, Secret Service Agent Sweeney found $1340 counterfeit in Dominguito's apartment. (Tr. 1187; GX 41)

** In August, Dominguito helped Agent Schartz buy $1000 counterfeit from Marte. (Tr. 1205-10; GX 49) On August 14, 1975, $19,940 counterfeit was seized from Marte's apartment. (Tr. 1106-08; GX 48)

*** Adames fled and turned himself in a few days later. (Tr. 590-91) Thereafter, Jacobo began to cooperate with the Secret Service and voluntarily surrendered $28,740 counterfeit. (Tr. 1034-37, 1099-1100; GX 43)

Washington laboratory of the Secret Service, and he testified that all of it had been produced by the same negatives and plates found by Agent Vezeris.* (Tr. 1256-78; GX 50A, 50B)

After Rivera and Hichez were arrested on this instant indictment, they both made statements in which each admitted receiving $20,000 counterfeit. Rivera claimed that he took his counterfeit money to a girlfriend and never went back for it, but had heard the "federal police" had taken it. The money was given to Rivera, he claimed, as payment for some unknown service to the Mafia. (Tr. 768-70) Hichez admitted that he helped move boxes from Coster Avenue to Bruckner Blvd., and that he was given counterfeit money for his help. At first, he claimed that he had not known the boxes had counterfeit money, and that later he burned his money because he was afraid. However, later in his interview he conceded that he had believed that the money he was loading into his car at Coster Avenue was counterfeit, and that on an earlier occasion he had been in an apartment where Adames and others were planning how to make and distribute the counterfeit money. (Tr. 1126-27)

II. The Defense Case

Hichez testified on his own behalf. There were no other witnesses for the defense. On direct examination, he claimed that he gave money to Molina only to buy a car from him (Tr. 1319-22), and that although he attended the meeting in the parking lot with Araujo, he heard nothing about counterfeit money. (Tr. 1323-28) He also denied that he knew what was in the boxes he moved be-

---

* The $4570 counterfeit seized from Antonio on December 24, 1974 (Tr. 1193-95; GX 54), of course, did not come from these same negatives and plates. (Tr. 1279) Antonio had been selling his counterfeit money to Adames and friends before Rivera helped them get some from Rodriguez and Molina.

fore the money was divided, although he admitted receiving the $20,000 counterfeit, which he again claimed that he burned. (Tr. 1329-35) Upon questioning by the Court, he disclosed he had taken Rodriguez to various places to buy photographic materials. (Tr. 1335) Moreover, on cross-examination, Hichez admitted that he had met Caesar and Papito in an apartment (Tr. 1344), that he had been in the Coster Avenue basement on a prior occasion (Tr. 1350-51), and that he lost money from his job when he helped Rodriguez with this errand. (Tr. 1353)

ARGUMENT

POINT I

The Evidence Of Prior Similar Acts Was Properly Received As Probative Of The Exsitence Of The Conspiracy And On The Issues Of Knowledge And Intent.

At the beginning of the direct testimony of Manuel Adames, the Government elicited evidence concerning various occasions in November and December, 1974, when Adames and Rafael Facundo, Rafael Jacobo, Felix Irrizarri and Freddy Almeida and others bought counterfeit money and then passed the money for profit to various retail stores in the New York City area. (*See e.g.* Tr. 47-54, 60-71, 73-78) Judge Cooper overruled defense objections to such testimony on the Government's offer that it was evidence of prior similar acts committed by the members of the conspiracy showing, among other things, motive, intent, a plan and knowledge. (Tr. 78-82)* Adames then described similar incidents involving Irri-

* Counsel for Hichez and Rivera were notified before trial of the Government's intent to offer such evidence. (Tr. 80-81)

zarri's knowing purchase and uttering of counterfeit currency. The Court reminded the jury "to watch with care the evidence as it relates to each defendant on trial." (Tr. 8a)

Shortly thereafter, in the robing room, counsel for Irrizarri acknowledged that under the law in this Circuit, including Rule 404 of the Federal Rules of Evidence, absence of mistake could be shown by such similar act evidence.* (Tr. 102) Moreover, he conceded that events occurring in November and December, 1974, were embraced by the indictment's language "in or about January, 1975." Counsel for Rivera objected only on the grounds of "degree" not because of "legal grounds or on the kind of evidence." (Tr. 114) Adames continued his description of the participation of Irrizarri and others in December, 1974. Contrary to the impression created by Rivera's brief, the entire amount of actual testimony from Adames on direct examination concerning events before January 1, 1975, consumed only 58 pages of the trial transcript,** and constituted only a minor portion of the evidence adduced at trial.

Adames next described Rivera's first participation in the scheme to distribute counterfeit money. In January, 1975, Rivera told Adames that Rodriguez and Molina had counterfeit money to sell, and he arranged a meeting for Adames to see the counterfeit money. (Tr. 131-135) Rivera was at this meeting when negotiations to buy counterfeit money took place. (Tr. 136, 142) Thereafter, Adames told Irrizarri and the others what took place (Tr. 144-148), and contacted Rivera to arrange another

---

* In his own opening, Irrizarri claimed that the central dispute in the case would be his lack of knowledge and intent. (Tr. 29)

** Tr. 45, 47-54, 59-78, 84-100, and 117-128.

meeting. (Tr. 148-149). Adames then obtained counterfeit money on behalf of himself, Irrizarri, Facundo, Almeida and Jacobo, from Rodriguez and Molina with Rivera's assistance. (Tr. 151-153) As before, they went out and passed the money (Tr. 154-157) and then got more counterfeit money from Rodriguez and Molina. (Tr. 159) On a subsequent occasion, Rivera asked Adames to give him something for the help he had given Adames in buying the counterfeit money. (Tr. 183-184) The rest of Adames' direct testimony concerned dealings in counterfeit money by Adames, Rivera and the others, and efforts by Rodriguez and Molina to "rip-off" the other conspirators of $1700,* and, of course, the manufacturing and division of the $3,000,000 counterfeit.

All three appellants now contend that this testimony in its entirety was improperly admitted into evidence. This argument is without merit. Initially, insofar as the argument is addressed to evidence adduced concerning events **after January 1, 1976**, it overlooks the simple principle that all of the evidence of passing counterfeit money concerning events after Rivera's introduction of Adames to Rodriguez and Molina in January, 1975, was evidence directly proving the crime of conspiracy with which Rivera was charged in the indictment. It was not simlar act evidence, but rather proof that Rivera had joined a conspiracy to distribute counterfeit money, and that counterfeit money was sold with Rivera's help and his knowledge that it was going to be used by other con-

---

* Rafael Facundo corroborated the testimony of Adames concerning obtaining and passing counterfeit money from November, 1974, through January, 1975, including the rip-off (Tr. 813-846), and the $50 counterfeit note that was passed for Rivera (Tr. 1013-1024). Similarly, much of this testimony was also corroborated by Rafael Jacobo (Tr. 1013-24), Freddy Almeida (Tr. 1217-1223), and, after his plea of guilty, by Felix Irrizarri (Tr. 1046-1053).

spirators with an int[illegible] to defraud the public. Such proof is "prejudicial" [illegible]ly in the sense that it proves the crime charged.

The evidence concerning the distribution of counterfeit money in November and December, 1974, before Rivera entered the conspiracy and helped provide counterfeit money, was properly admitted for two separate reasons. It was evidence of the crime charged in the indictment, and in the alternative was evidence of identical crimes.*

The indictment charged a conspiracy to distribute counterfeit currency beginning in or about January 1, 1975. The evidence clearly established that in November and December, 1974, Adames and at least four other conspirators (including Irrizarri, who was still on trial at the time of Adames' testimony) conspired to and did receive and distribute counterfeit money with an intent to defraud. It is well settled in this Circuit that evidence of acts by conspirators immediately preceding the conspiracy as alleged in the indictment is admissible to show the "background," *United States* v. *Colasurdo*, 453 F.2d 585, 591 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972), or "development," *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 197[illegible], of the conspiracy, or the "pattern of conduct" of the conspirators, see *United States* v. *Papadakis*, 510 F.2d 287, 295 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). In particular, this Court has recently noted that proof of prior crimes is particularly probative to show the existing relationships among the conspirators, *United States* v. *Natale*, 526 F.2d 1160, 1174 (2d Cir. 1975).

---

* The Court admitted the evidence as similar acts. However, if it could properly be characterized as evidence of the charges in the indictment, then this Court can review it as such, since its more limited use at the trial only prejudiced the Government.

The evidence of events in November and December all related to the purpose, scope and existence of the conspiracy and the reasons why Adames and others joined the effort to manufacture counterfeit money. Of course, acts by other members of a conspiracy may be used to prove the existence and purpose of the conspiracy. *United States* v. *Cohen*, 489 F.2d 945 (2d Cir. 1973); *United States* v. *Papadakis*, *supra*.

> Thus, the acts of others not involving the defendant directly may come in against him merely to show the existence of a conspiracy, with which he is to be linked by quite separate proof. . . . acts by such others even before or after the period of the conspiracy may still be relevant in suggesting its existence and its aims.

United States v. *Costello*, 352 F.2d 848, 854 (2d Cir. 1965), *vacated on other grounds*, 390 U.S. 39 and 201 (1968).

The November and December events merely established the origins and background for the conspiratorial pattern of 1975 in which Rivera, Hichez and Araujo so readily joined when given the opportunity. As such, it was admissible as tending to prove the origin and development of the conspiracy that the appellants were shown, "by quite separate proof," *United States* v. *Costello*, *supra*, to have joined. *United States* v. *Buckner*, 108 F.2d 921, 930 (2d Cir.), *cert. denied*, 309 U.S. 669 (1940); see *United States* v. *Cohen*, *supra*, 489 F.2d at 949; *United States* v. *Colasurdo*, *supra*. Accord, *Lutwak* v. *United States*, 344 U.S. 604, 617-619 (1953); *United States* v. *Nathan*, 476 F.2d 456, 460 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973).

Alternatively, the evidence was properly admitted on the grounds advanced at trial and adopted by the District Court, namely, as prior similar acts. The law in this

Circuit plainly permits introduction of relevant evidence relating to prior unlawful acts, except where the purpose of such evidence is to show bad character or criminal disposition. Thus, this Court recently observed that

> we are by now firmly wedded to the inclusory form of the rule, that evidence of other crimes is admissible, if relevant, except when offered solely to prove criminal character.

United States v. *Papadakis*, *supra*, 510 F.2d at 294. See also, *United States* v. *Campanile*, 516 F.2d 288, 292 (2d Cir. 1975); *United States* v. *Gerry*, 515 F.2d 130, 150-41 (2d Cir. 1975); *cert. denied*, 44 U.S.L.W. 3358 (Dec. 15, 1975); *United States* v. *Brettholz*, 485 F.2d 483, 487-88 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974); Rule 404 (b), Federal Rules of Evidence.

Whether such evidence should be admitted is a question which calls for the exercise of the trial court's broad discretion, informed upon a weighing of the probative value of the evidence against its potentially prejudicial effect. *United States* v. *Brettholz*, *supra*, 485 F.2d at 487-88. *Cf.*, *United States* v. *Ravich*, 421 F.2d 1196, 1204-05 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970). The trial judge's determination is entitled to great weight and will rarely be reversed on appeal. *United States* v. *Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975); *United States* v. *Brettholz*, *supra*, 485 F.2d at 487-88.

While the appellants appear to recognize these principles, they suggest the evidence was inadmissible because it had nothing to do with them. Their statement of the facts and of the law is incorrect. As set forth in detail at pp. 12-13, *supra*, it is crystal clear that Rivera was substantially involved in and responsible for all the acts of passing counterfeit money which occurred after January 1, 1975. Thus, the demonstration of the origins

of the conspiracy prior to his joining it was entirely proper.

Moreover, the evidence both before and after January 1, 1975, was clearly admissible as to Irrizarri, who did not plead guilty until January 15, 1976, and the other defendants. It is well settled that evidence of a similar act is admissible where knowledge, intent or design is at issue, "either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense." *United States* v. *De Cicco*, 435 F.2d 487, 483 (2d Cir. 1970). It is not necessary for a defendant specifically to present a relevant defense in order for evidence of similar acts to be admissible. *United States* v. *Johnson*, 382 F.2d 280, 281 (2d Cir. 1970); *United States* v. *Byrd*, 352 F.2d 570 (2d Cir. 1965).

The statutes charged in this indictment required the Government to establish knowledge that the bills were counterfeit and a specific intent to defraud. If there were any serious doubt that these were the central issues in the trial, counsel for Irrizarri erased it in his opening statement:

> Now, I'm going to tell you this right at the very outset. When my client was arrested he was found in possession of $430 and that money was counterfeit money, and before his arrest he handled a package and in that package was some $33,000 of counterfeit money, and we will introduce evidence which will show all of the facts and circumstances surrounding each of those acts. I submit when we have done so you will see that my client committed no criminal act; that he did not possess the felonious guilty intent, the desire to violate the law, the knowing act of committing a crime which is necessary in order to convict. (Tr. 28-29)

Obviously the issues of knowledge and intent were glaringly present, and it was proper for the Government to prove these elements with evidence of similar acts. *United States* v. *De Cicco, supra; United States* v. *Cohen, supra,* 489 F.2d at 950 (issues raised in opening statement of the defendant); *United States* v. *Brettholz, supra; United States* v. *Freedman,* 445 F.2d 1220, 1224 (2d Cir. 1971). Clearly, evidence of knowingly buying and passing counterfeit money in a time period just prior to that charged in the indictment was highly relevant to the crimes charged against Irrizarri in the indictment. Indeed, Irrizarri conceded this at trial. (Tr. 102) See, e.g., *United States* v. *Leitner,* 312 F.2d 107 (2d Cir. 1963); *cf. United States* v. *Gocke,* 507 F.2d 820 (8th Cir. 1974), *cert. denied,* 420 U.S. 979 (1975).

Perhaps realizing the force at this argument in favor of the basic admissibility of the evidence, Rivera suggests that even if the evidence of similar acts was originally proper, error was committed by not granting "counsel's standing motion to strike the evidence" after Irrizarri pleaded guilty. (Br. 22) There was no such "standing motion." On the contrary, Judge Cooper told counsel "ultimately if it is not connected up you have a motion to strike or a motion for a mistrial." (Tr. 82) There were no motions to strike any of this testimony at the end of the Government's case (Tr. 1280-96), despite the Government's statement of the multiple purposes for which such testimony could be used. (Tr. 1300-01) Judge Cooper denied Rivera's general motion to strike at the close of the entire case on the grounds that there was no foundation for such a motion.* (Tr. 1358) In fact, there

---

* The basis for the motion was the alleged failure of the Government to connect certain evidence to Rivera. However, none of the appellants bothered to specify a single piece of evidence that remained unconnected. Obviously such a motion was unfounded since there was ample independent proof that each of the appellants had joined the conspiracy.

were no specific objections to or motions to strike any of Irrizarri's testimony concerning his pre-1975 activities (Tr. 1041-59), nor was there a specific motion to strike any of Almeida's testimony. (Tr. 1213-47)

This is completely understandable because at the time the evidence of similar acts was first offered, counsel for Rivera made clear to the Court that he did not object to its legal admissibility, but only to the degree or detail of such evidence. (Tr. 114) The Court concluded then "that on balance I feel compelled to allow that testimony to stand."

During the course of the trial, it became clear that the Court was not concerned with whether the evidence or similar acts was proper and probative but rather with whether it was too much detail for the jury to absorb—whether "each fiber, each strand of relevant evidence" in light of the "laborious procedure of the interpreters" was necessary. (Tr. 1304) Judge Cooper struck the proper balance by moving the trial along and excluding excessive detail. In the end, he concluded that "the factual issues can be sharply focused." (Tr. 1307) This Court has held that the process of balancing "is primarily for the trial judge who has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain." *United States* v. *Leonard, supra*, 524 F.2d at 1092. Judge Cooper demonstrated proper attention and concern for the problems raised at trial, and, particularly in view of the overwhelming legal authority in support of the admissibility of the evidence, his exercise of discretion should not be overturned on appeal.

Finally, Rivera argues that the Court's charge and the prosecutor's summation on this evidence were improper. (Tr. 1379-81, 1513) The prosecutor treated the evi-

dence solely as constituting a demonstration of prior similar acts, and faithfully adhered to the limited legal inferences that the jury could draw from such evidence. Indeed, none of the appealing defendants objected to this portion of the prosecutor's summation. (Tr. 1379-81) As to the charge, a reading of the entire charge on this issue reveals that error was not committed, and that appellants were in no sense deprived of a fair trial on account thereof. For example, the Court correctly stated:

> . . . in your assessment of the evidence relating to conspiracy you may consider acts and declarations by alleged co-conspirators which preceded January 1, 1975, if those acts relate to the alleged conspiracy and were in furtherance of the conspiracy.
>
> . . . It is to explain the particular conspiracy before you, and that therefore you may consider that evidence in order to understand the conspiracy before you. (Tr. 1566)

Later the Judge continued:

> Evidence that an act was done at one time or one occasion is not any evidence of proof whatever that a simlar act was done at another time or on another occasion. That is to say, evidence that a defendant has committed an act of a like nature may not be considered by the jury in determining whether the accused committed any act charged in the indictment.
>
> Then how may it be considered, this evidence dealing with prior similar acts? The jury may consider that evidence dealing with the alleged acts of a like nature solely in determining whether the defendant acted with guilty knowledge or intent.
>
> Such evidence, relating to prior acts, may not be considered by the jury for any other purpose whatsoever. I emphasize, the jury is not to infer that

> the defendants have a criminal propensity or bad character because of this evidence. (Tr. 1594-95).

Since this follows the law of similar acts, it is hard to see the error in the charge. The instructions delivered to the jury by the Court was similar to the request to charge submitted by the Government. (Tr. 1366-74) Not only was no objection made to the Government's version, but no defendant offered a different version. Rule 30 of the Federal Rules of Criminal Procedure provides that "No party may assign as error any portion of the charge of omission therefore unless he objects thereto before the jury retires to consider its verdict stating distinctly the matter to which he objects and the grounds for the objection." Thus, no claim concerning the charge can be heard.

On those grounds alone appellants are foreclosed from raising the issue now. *United States* v. *Papadakis*, *supra*, *United States* v. *Cohen*, *supra*. In addition, of course, the Court distinctly instructed the jurors that they could not simply infer from the commission of similar acts that the defendants committed the acts charged in the indictment, and further that guilt was personal and must be proved against each defendant. (Tr. 1521, 1521a) Particularly in view of the overwhelming evidence against each defendant, including partial confessions by Rivera and Hichez, the record is clear that the defendants were accorded an eminently fair trial.*

---

* It is impossible to see how Araujo was adversely affected, since at the jury's request, all of the testimony pertaining only to Araujo was read to them (Tr. 1648-1650), and forty minutes later they returned their verdict of guilty on all counts.

POINT II

The Prosecutor And The Judge Did Not Vouch For The Credibility Of The Government's Witnesses.

All three appellants contend that the prosecution improperly vouched for the credibility of its accomplice witnesses by proving through such witnesses that the prosecutor told them they would be indicted for perjury if they testified falsely. This contention is without foundation, and totally misconceives the basis on which a witness' credibility may be attacked and supported.*

The Government called five co-conspirators who testified fully about their own involvement in this counterfeiting conspiracy and the various conspiratorial activities of the three appellants. As Rivera's own brief makes clear (R. Br. 24), the defense sought to attack such witnesses as self-serving liars who had committed a variety of counterfeiting-related crimes, for some of which they were not being prosecuted in exchange for their cooperation with the Government.** Rivera also points out that witnesses Adames, Facundo and Almeida at one time or another lied to Federal authorities.

The defense threw down the gauntlet on the credibility of the Government's witnesses in the opening statements. Araujo claimed to be "a victim of people trying to buy

---

* Appellants do not claim that the prosecution at any time expressed his personal belief in the evidence or the defendants' guilt.

** As was its privilege, and *obligation*, the Government brought out on direct examination the misconduct and promises of leniency with respect to such witnesses. *United States* v. *Rothman*, 463 F.2d 488 (2d Cir.), *cert. denied*, 409 U.S. 956 (1972); *United States* v. *Del Purgatorio*, 411 F.2d 84 (2d Cir. 1969).

their way out of trouble by throwing him into the pot ti (sic) stew along with ot[illegible]eople." (Tr. 25) Counsel for Irrizarri attacked the Government's witnesses "who have plea bargained, who are cop-out artists . . . criminals . . . interested only in the preservation of their own necks . . . oblivious and in no way concerned with the sanctity of telling the truth." (Tr. 28) The closing arguments echoed these claims. The Government's witnesses were attacked "as up on the stand to do a job for the Government," (Tr. 1453); "as living a life of lies," (Tr. 1476); "prepared to try and lie their way out of every situation they could be in?" (Tr. 1477); "they have been rehearsing for years their type of honor, their type of treachery." (Tr. 1479); "when they were questioned by the agents and the other U.S. attorneys, they lied from force of habit," (Tr. 1479-80). Finally, counsel for Rivera suggested explicitly that the witnesses brought innocent people into the case in order to help themselves and please the prosecutor. (Tr. 14[illegible])

Of course, defense counsel have every right to [illegible]k the credibility of Government witnesses and te[illegible]r motivation for testifying and examine their state of mind. However, the jury was certainly entitled to know exactly what that state of mind was and what the witnesses believed and hoped the consequences of testifying would be. The only way to put such evidence before the jury is to ask the witness what he knows and how he knows it. It is ludicrous to suggest, as the defendants do, that witnesses may be attacked for their lack of scruples, self-interest and proclivity for self-serving falsifications, and yet claim that the jury may not hear that the Government has warned the witnesses that they will be prose-

cuted for false testimony.* See *United States* v. *Rivera*, 513 F.2d 519, 529 (2d Cir. 1975).

Appellants, in short, want the jury to know that the Government has promised benefits to its witnesses, but not to know that conditions and warnings were attached. However, the Government was certainly entitled to establish and argue that it had taken specific measures to discourage false testimony. *United States* v. *Aloi*, 511 F.2d 585 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3344 (Dec. 8, 1975); *United States* v. *Koss*, 506 F.2d 1103, 1113 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975); see *United States* v. *La Sorsa*, 480 F.2d 522 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973); *United States* v. *Benter*, 457 F.2d 1174 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972).**

Appellants' novel argument that a jury may not hear evidence that a witness has been told that the penalty for false accusations will be prosecution for perjury, has

---

* Three witnesses gave direct testimony against one or all of the appellants: Adames, Facundo and Almeida. Of these, only Adames gave any testimony concerning the prospect that he would be prosecuted for perjury:

Q: What did Mr. Devorkin promise you?

A: To inform the Judge the day of my sentencing of my cooperation if I had told the truth, the whole truth about this case.

* * *

Q: What if anything, did Mr. Devorkin promise you would happen if you testified falsely?

A: I will be prosecuted by the justice. (Tr. 625-26)

Adames also testified on redirect examination he had been told that the Government's promise to inform the sentencing judge about his cooperation did not depend on the results of the trial. (Tr. 741-43).

** Of course, this in no way limited crose-examination by defense counsel. *Compare Alfred* v. *United States*, 282 U.S. 687 (1931), relied on by appellants. Rather, the jury was in a position to appraise the witnesses upon a full, not slanted, record.

been squarely rejected. In *United States* v. *Koss*, *supra*, this Court upheld the introduction of a written agreement with a Government witness which showed he was liable to prosecution for all crimes committed if he perjured himself when testifying for the Government. 506 F.2d at 1113. In the recent trial of Court of Appeals Judge Otto Kerner, *United States* v. *Isaacs*, 493 F.2d 1124 (7th Cir.) (per curiam; *Lumbard*, J. sitting by designation), *cert. denied*, 417 U.S. 976 (1974), the defense claimed the prosecutor improperly gave his opinion that an accomplice was a truthful witness by stating "Those were the terms. In return for his truthful testimony, the charges against William Miller in this case would be dismissed." The Court readily dispensed with such a defense contention:

> The statement does not vouch for Miller's credibility. There is no insinuation that the comment of the prosecutor was based on anything de hors the record. See Lawn v. United States, 355 U.S. 339, 359-60 n.15. The argument of Isaacs that the prosecutor's reference to the immunity agreement improperly insinuated that the Government possessed certain evidence outside the record is fanciful. The agreement was before the jury for such consideration as anyone might wish to give it. 493 F.2d at 465.

Similarly, in *United States* v. *Aloi*, *supra*, the agreement with the chief accomplice witness and the prosecutor's warnings about perjury to him were merely some "of many items to bear on the question [of credibility]," and since, in light of all the other evidence, that issue was properly presented to the jury, there was no denial of a fair trial. 511 F.2d at 598. See *United States* v. *DeAngelis*, 490 F.2d 1004, 1008 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974); *United States* v. *Greenberg*, 268 F.2d 120 (2d Cir. 1959).

Appellants' attack on the trial judge is equally misplaced and unjustified. Judge Cooper no more vouched for these witneses than did defense counsel. His total instructions on accomplices were both proper and even-handed, serving to point out arguments for and against such witnesses by counsel. (Tr. 1600-05) In particular, he told the jury at great length what an accomplice is and how and why they are to be very careful of such testimony.*

Appellant Rivera quotes the charge out of context, seeking to create an appearance that it singled out and concentrated on favorable qualities of the accomplice's testimony. Nothing could be less accurate. Any reading of the entire accomplice charge reveals that the trial court quite properly pointed out the weaknesses and strengths of the accomplice testimony.** It is elementary that the

---

* In light of the substantial and material corroboration of the accomplices, not the least of which was supplied by the substantial confessions of Rivera and Hichez that they had received counterfeit money as alleged, appellants completely overlook the fact that the trial judge may have been justified in denying them an accomplice charge. *United States* v. *Lee*, 506 F.2d 111, 120 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1002 (1975); *United States* v. *Cianchetti*, 315 F.2d 584, 592 (2d Cir. 1963). Indeed, given the free hand given to defense counsel to go far beyond the record in their insinuations concerning the credibility of the witnesses, any failure to charge the jury concerning accomplices could not be viewed as prejudicial. *Id.*

** Significant portions of the court's instructions on accomplice testimony are as follows:

> The fact that a number of Government witnesses are accomplices is to be carefully considered by you as bearing upon their credibility. That means their believability. **(Tr. 1600)**
>
> The testimony of such persons, however, should be viewed with caution and scrutinized with the utmost circumspection. (Tr. 1601)

[Footnote continued on following page]

instructions must be considered as a whole and it is sufficient if they treat the issues fairly and adequately." *United States* v. *Isaacs*, *supra*, 493 F.2d at 1163; *Cupp* v. *Naughten*, 414 U.S. 141 (1973); *United States* v. *Santiago*, 518 F.2d 1130 (2d Cir. 1976). Application of this principle here requires approval of Judge Cooper's instructions.

The suggestion that the judge and prosecutor *and* the jury were watching the witness was no more than a proper reference to *one* of the factors bearing on credibility, that is, the penalty for and consequences of perjury, and it was immediately preceded and carefully balanced by pointing out the possibility that the witness "is building it up in order to make a good impression." (Tr. 1604) Moreover, the charge repeatedly reminded the jury that only their impression counted: "But the analysis and the final grading is yours." (Tr. 1603)

> All that is for you and I would suggest the most important part of your function. (Tr. 1604)

> What I am emphasizing is that that particular element or elements does not automatically nullify them. But you have to decide that issue. And so you will consider whether the testimony was inspired by self-interest, personal advantage, hostility or whatever human factor may be involved.
>
> You should consider whether the testimony of such witnesses was a fabrication induced by a promise or even a belief that they will receive favorable consideration in their respective cases. (Tr. 1601-02)
>
> I instruct you that an accomplice's testimony implicating a defendant as a perpetrator of a crime is inherently suspect, for such a witness may well have an important personal stake in the outcome of a trial. An accomplice so testifying may believe that the defendants' acquittal will vitiate expected rewards that may have been either explicitly or impliedly promised him in return for his plea of guilty and for his testimony. (Tr. 1602)
>
> And so, if you find the testimony of any of these accomplices was deliberately untruthful, throw it out. (Tr. 1603)

Moreover, that portion of the charge about "truth emerges from the most unlikely sources," criticized by Rivera in his Brief at 25, has been approved by this Court. *United States* v. *Birnbaum*, 373 F.2d 250, 260 (2d Cir.), *cert. denied*, 389 U.S. 837 (1967). Finally, Judge Cooper included in his charge lengthy and strongly worded instructions that it is the exclusive province of the jury to determine the facts and a warning that the judge in no way was expressing any opinion on the evidence. (Tr. 1522-1526)

Nowhere in the judge's charge is there the slightest suggestion that he or the prosecutor were "expert in truth-detection" (Rivera Br. 25), or had evidence known to them, but not the jury. See *United States* v. *Greenberg*, *supra*. Appellants rely exclusively on *Quercia* v. *United States*, 289 U.S. 466, 471 (1933). However, there is most certainly nothing in the charge here which even remotely resembles the judge's statement to the jury there, that he believed, on the basis of a gesture by the defendant, that "every single word [the defendant] said, except when he agreed with the Government's testimony, was a lie." *Id.* at 468. Rather, as this Court has noted, under circumstances involving far more critical commentary in the charge, Judge Cooper's instructions did no more than "comment in order to give appropriate assistance to the jury." *United States* v. *Goldstein;* 120 F.2d 485, 491 (2d Cir. 1941), *aff'd*, 316 U.S. 114 (1942); accord, *United States* v. *Haynes*, 291 F.2d 166 (2d Cir. 1961). As such, the charge, which was evenhanded and based solely on the evidence, was completely proper and fair. *See, United States* v. *La Sorsa, supra.*

POINT III

The Court's Instructions Were In All Other Respects Correct.

Araujo raises two points not advanced by Rivera and Hichez. He contends that the Court denied him a fair trial by improperly commenting on his failure to testify and by giving the jury the impression that the Court believed Araujo was guilty. Neither contention is supported by the record. This Court has repeatedly recognized that the instructions to the jury cannot be dissected and analyzed sentence-by-sentence, but must be considered as a whole to determine if they are fair and adequate. *United States* v. *Birnbaum*, *supra* 323 F.2d at 262; *United States* v. *Andreadis*, 366 F.2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); accord, *Cupp* v. *Naughton*, *supra*; *United States* v. *Santiago*, *supra*. When so viewed, Judge Cooper's instructions were eminently correct.

A. The Court Did Not Comment on Araujo's Failure to Testify.

Araujo complains that the Court "quickened the jury's imagination" as to why he did not testify, and then harshly warned them not to let anything improper enter their deliberations. (Tr. 1619) It is hard to see the basis of Araujo's complaint. At that point where he told the jury not to consider punishment, Judge Cooper also instructed:

> Suppose in a criminal case—let's not take this case, take another criminal case. How do you know what that defendant is and what his background is, a defendant who hasn't taken the stand and against whom you can't hold a thing because

> he hasn't taken the stand. How do you know who he is?
>
> So you lay off of that because the Judge says it is none of your business. (Tr. 1619)

Read fairly and objectively, this statement fully protected the defendant's interests, as a simple instruction that the jury should not speculate why the defendant has not testified. Indeed, while counsel complained after the charge that the defendant's background was improperly linked to his failure to testify, he chose to rest on the alleged harmful significance of the statement rather than offer any suggestion of how to restate the issue in a way he considered proper. (Tr. 1636-39)

This statement did not prejudice Araujo's right to a fair trial. Judge Cooper repeatedly and in the strongest possible language, directed the jury to ignore Araujo's failure to testify.* Even if the language isolated by

---

* Certain defendants have not testified in this case, and this is their absolute constitutional right, and as you go about in the jury room talking with earnestness, I'm sure, about the case, if anyone should say: Well, why didn't so and so or so and so take the stand, have the fortitude in the name of common decency as an American minister of justice to say to that person: You have no right, not even to the extent of a grain of sand, to hold it against a defendant because he didn't testify. That is what the Judge said was the law, and if you didn't understand it, let's go out and ask the Judge (Tr. 1609-10)

* * * * *

So when I say to you that a defendant has no obligation whatever to testify, it is just that and nothing less than that. He has no obligation to call any witnesses, adduce any proof of any kind. That is the law, that is America, and it works, because if the case is strong enough a conviction will lie based on strong presentation of evidence and the law applicable to that evidence, and if it isn't strong enough to meet the test, out it goes.

So, you'll see that what I told you earlier, how it naturally

[Footnote continued on following page]

Araujo were to have the significance he now imputes to it, it is overwhelmingly clear on the record as a whole that the jury was properly admonished not to consider his failure to testify.

B. The Court did not Invade the Jury's Province to Determine the Facts Nor did it Demonstrate Belief in Araujo's Guilt.

Araujo's final attack on the instructions to the jury centers on the claims that (1) that the charge on overt acts was incorrect and (2) it included judicial opinions about evidence without accompanying cautionary remarks. These claims are nonsense, since they are based on a portrayal of the Court's charge that distorts it beyond recognition.

The Court's instructions on overt acts covers four pages of transcript (Tr. 1562-65), and is an accurate and proper definition. The Court gave one hypothetical example of an overt act, and repeated, "that the overt

---

follows that a defendant need not take the stand, need not adduce any proof of any kind since the burden rests upon the Government—and remember I told you that the burden of proof never shifts to a defendant—the defendant need not take the stand or call witnesses because it still remains the burden of the Government to prove the guilt of the defendant beyond a reasonable doubt.

Now the fact that I keep on saying it is just to constantly remind you of the measurement of proof and by no means to indicate how the Judge feels as to whether or not that measurement has been met or not. I just want to be mighty sure you know what that measurement is and that you apply it to the proof in this case; use the law as given to you by the Court, apply it to the facts as you find them to be and come up with your determination.

In conclusion, then, on this point in no respect might the fact that a defendant did not testify enter into your deliberations. If you do it, you befoul your oath and you are guilty of a crime that is as reprehensible as any brought against these defendants (Tr. 1612-14)

act was done by one of the conspirators must be proven beyond a reasonable doubt." (Tr. 1562) It also gave an example from the indict[illegible].t other than the one involving Araujo:

> that certain defendants, naming them, delivered quantities of money to Molina and other persons to finance the manufaucturing of counterfeit Federal Reserve Notes. (Tr. 1563) [Overt Act 1].

Finally, the jury was reminded that all of the overt acts were listed in the indictment which they would take to the jury room. (Tr. 1564)

It is clear beyond peradventure that the charge, taken as a whole, did not state or even suggest that the jury could or should convict Araujo because of the one overt act involving him. Nor did the Court venture an opinion on this as evidence * or distort or add to the evidence, especially in light of the repeated and strongly worded instructions to the jury that it alone determined the facts and nothing said by the Court on the subject should be considered.**

Finally, Araujo contends that a single misstatement of evidence and correction thereof in this seventeen-hundred page record was fatal to his chances of getting a fair trial. This claim is frivolous.

In response to an objection to a speculative question by Araujo's counsel (Tr. 704), the Court correctly stated

---

* Araujo's suggestion that this overt act was not established by the evidence is absurd. On the contrary, the jury could have readily inferred from Araujo's repeated presence in the apartment in the building he superintended, his helping to maintain security of the premises, equipment and counterfeit negatives, and his possession of one of the special keys to the door, that he "provided the apartment".

** The Court also gave Araujo's requested instruction that a mere spectator of a crime, even with knowledge, is not a participant. (Tr. 1580)

the purpose for the question (Tr. 705) and then misstated that Araujo was also present when the counterfeit money was divided up. (Tr. 706) The Court and Government quickly corrected this single error (Tr. 706); the Court, however, reminded counsel that evidence as to knowledge of the counterfeiting had been elicited.*

The Court also reminded the jury, as it was careful to do throughout the trial and in its charge, that "the believability of [the evidence] which is up to the jury, . . . I don't know how true it is, . . ." (Tr. 705) "I say that it has been elicited. What weight the jury wishes to give it is up to the jury. They can discount the whole thing." (Tr. 706)

The Court did not invade the jury's province over the facts and most certainly did not express an opinion of guilt. Araujo's reliance on such cases as *United States* v. *Fernandez*, 480 F.2d 726 (2d Cir. 1973); *United States* v. *Nazzaro*, 472 F.2d 302 (2d Cir. 1973); and *United States* v. *DeSisto*, 289 F.2d 833 (2d Cir. 1961), is unpersuasive. There the trial judge intervened in the conduct of the trial to such an extent against the interests of the defendant that the atmosphere of an impartial judicial tribunal was destroyed. Here the trial judge maintained impartiality at all times, while recognizing that he had a duty to be more than a mere moderator to insure that the trial was fair to both sides. *United States* v. *Bernstein*, ___F.2d __, Slip op. 6631 (2d Cir., March 4, 1976); *United States* v. *Cuevas* 510 F.2d 848 (2d Cir. 1975); *United States* v. *Curcio*, 279 F.2d 681 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960).

---

* Of course, there had been a great deal of testimony from Adames and Facundo that Araujo had been present during discussions of the counterfeit plans, and the making of negatives and that he had helped the photographic operation in his basement.

Judge Cooper did no more than clarify and analyze the issues, and most certainly did not interrogate defense witnesses or state his views in such a way as to harass or discredit them or express his disbelief. *United States* v. *Cuevas, supra.* Nor did he distort or add to the evidence or comment in a way amounting to a direction to the jury to find the defendants guilty, and he strenuously and repeatedly reminded them that they alone were to evaluate the evidence. Finally, an isolated comment, even if incorrect, in an otherwise fair and proper charge, does not require a reversal of the conviction. *United States* v. *LaVecchia,* 513 F.2d 1210 (2d Cir. 1975); *United States* v. *Pinto,* 503 F.2d 718 (2d Cir. 1974).

POINT IV

The Sentencing Of Appellants Did Not Punish Them For Going To Trial And Was In All Respects Proper.

Appellants Rivera and Hichez contend that remarks made by the trial judge to the jury after it returned its verdict establish that when subsequently sentenced they were punished solely because they chose to go to trial. Rivera also claims that he was sentenced on the false assumption that he had assisted in passing counterfeit money in retail stores. Araujo does not join in these contentions, which in any event are frivolous.

It is axiomatic that absent reliance on improper considerations or materially incorrect information, a sentence which does not exceed the statutory maximum is not reviewable. *United States* v. *Wiley,* 519 F.2d 1348, 1351 (2d Cir. 1975); *United States* v. *Tramunti,* 513 F.2d 1087, 1120 (2d Cir.), *cert. denied,* 44 U.S.L.W. 3201 (Oct. 7, 1975); *United States* v. *Velazquez,* 482

F.2d 139, 142 (2d Cir. 1973); *United States* v. *Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973); accord, *Dorszynski* v. *United States*, 418 U.S. 424, 440-41 (1974). Furthermore, the mere fact that a defendant receives a harsher sentence than a co-defendant who pleads guilty does not require vacating the sentence. *United States* v. *Salazar*, 485 F.2d 1272 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *United States* v. *Stidham*, 459 F.2d 297 (10th Cir.), *cert. denied*, 409 U.S. 868 (1972). There is no evidence here that the Court relied on anything but the full trial record and personal histories in sentencing each appellant. Accordingly appellants' assertion should be rejected.

In making this claim, appellants have once again taken out of a seventeen-hundred page record, one sentence of Judge Cooper's which was made to the jury after its verdict and after over two weeks of trial, and grossly exaggerated and fantasized it beyond any significance.* In this instance they have also mischaracterized the meaning of what the trial judge said.

Appellants suggest that Judge Cooper stated he would sentence leniently those who pleaded guilty *solely because* they pleaded guilty, and therefore they wish this Court to infer that those who went to trial were punished for doing so. But, of course, that is neither what Judge Cooper said nor a proper inference to be drawn. The proper quotation is

> And sure, I'm going to cut off a bit when I come to sentence those who did plead guilty, and

---

* It seems incredible that appellants could seriously suggest that this post-verdict statement to the jury "reveals a general policy" of sentencing, let alone what Judge Cooper did one month later when he sentenced the appellants after full consideration of the trial record and their background as revealed in a complete pre-sentence investigation.

> if I believe there has been cooperation, I'll take that into consideration. (Tr. 1656)

Quite obviously, to the extent these remarks mean anything about the sentencing of these appellants, as opposed to the cooperating witnesses, they suggest that Judge Cooper was going to take into consideration the cooperation of the accomplice witnesses at the time of their sentencing not simply because they pleaded guilty, but because of what they did. This Court has recognized that such a sentencing policy is completely proper:

> There can be no question that a defendant's cooperation in the investigation and prosecution of . . . other serious crimes is highly material to mitigation of punishment not only because the defendant should be rewarded for his services to the community but also because cooperation with law enforcement authorities is a significant step toward rehabilitation. *United States* v. *Malcolm*, 432 F.2d 809, 817 (2d Cir. 1970).

Accord, *United States* v. *Vermeulen*, 436 F.2d 72 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971). Of course, such considerations would also apply to appellants' conduct after their conviction.

In this regard, appellants ignore the context and timing of Judge Cooper's statement. Those who pleaded guilty had provided extensive cooperation in breaking up and bringing to justice a $3,000,000 counterfeit conspiracy, and they testified in open court, apparently with remorse, admitting all their wrongs and helping to convict their friends and associates. It is no wonder that Judge Cooper quite properly expressed the view that all of these facts, signified by the plea of guilty, should be taken into consideration.

A complete reading of Judge Cooper's remarks to the jury after the verdict makes clear that both his "general policy" and his attitude toward these appellants were correct, and in fact laudable:

> What do you think is going to happen now? There is going to be a report pursuant to the Court's direction prepared by the Probation Department as to each one of these three, who they are, where they came from, what their background is, what they have accomplished, what they have done, who their parents are, their sisters, who they are as human beings.
>
> I know what they did. The evidence was repeated over and over again. That won't be new to me. I heard it. I want to know who they are as human beings.
>
> What you have done enables me to send them away, if I want to, for as much as 30 years or thereabouts, or to give them no years, whatever in my judgment is the right thing to do by them and by the community. And sure, I'm going to cut on a bit when I come to sentence those who did plead guilty, and if I believe there has been cooperation, I'll take that into consideration.
>
> It will all be on the record, just the way everything is here. No secret. Right out in open Court.
>
> I have no idea right now whether they are going to get one year, ten years or what until I get that report. Like the surgeon, I want to look at the X-rays. I want to know where to cut. (Tr. 1656-57)

A careful review of the sentencing of these appellants reveals not the slightest implication, let alone substantiation, that any of these appellants was punished for

going to trial. See *United States* v. *Mitchell*, 392 F.2d 214 (2d Cir. 1968). This Court has recently reiterated that it will not delve behind a District Court's statement of the bases upon which it rests imposition of sentence. *United States* v. *Herndon*, 525 F.2d 208, 209 (2d Cir. 1975). Appellants' one thin reed, taken out of context and distorted from its proper and laudable meaning, provides no support for this Court to do otherwise. Appellants' primary reliance on such cases as *Scott* v. *United States*, 419 F.2d 264 (D.C. Cir. 1969), and *Thomas* v. *United States*, 368 F.2d 941 (5th Cir. 1966), is misplaced since it fails to acknowledge the critical distinction recognized by this Court in *United States* v. *Vermeulen*, *supra*, 436 F.2d at 76. This case does not involve any attempt to induce convicted defendants to confess their guilt as a sign of repentance, or a judicial threat of sentence to coerce a guilty plea as in *United States* v. *Tateo*, 214 F. Supp. 560 (S.D.N.Y. 1963). Rather, on the record as a whole, it is clear that the trial judge did not penalize appellants for the trial or their silence, but only correctly indicated that proper considerations for sentence are (1) the need for rehabilitation in view of recognition of fault, and (2) the significance of the contribution to the community through cooperation with the authorities. *United States* v. *Floyd*, 496 F.2d 982, 989 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974); *United States* v. *Stockwell*, 472 F.2d 1186, 1187 (9th Cir.), *cert. denied*, 411 U.S. 948 (1973); *United States* v. *Vermeulen*, *supra*; *United States* v. *Malcolm*, *supra*; *Baker* v. *United States*, 412 F.2d 1069 (5th Cir. 1969), *cert. denied*, 396 U.S. 1018 (1970).

Appellant Rivera's final sentencing contention is an equally mistaken distortion of the record, and an even thinner reed upon which to rest a case for resentencing. Judge Cooper did not not even suggest he was holding Rivera personally responsible for passing counterfeit

money, let alone that "a primary reason for the imposition of a ten-year sentence . . . was to punish Rivera" for these events. (R. Br. 31) Such evidence, of course, merely reflected the nature of the crime committed by appellants and the logical consequences of helping to manufacture and distribute $3,000,000 counterfeit, with an intent to defraud, as required by the statute. This reference is simply representative of the nature of appellants' crimes which were far more serious than passing $50 counterfeit notes to liquor stores. In any event, Rivera was directly responsible for the passing of counterfeit money resulting from his helping Adames buy it from Molina and Rodriguez and his sale of his own counterfeit money. He also was indirectly responsible for the remaining portion of the $3,000,000 involved in this case. Moreover, it is clear, that one of the real reasons for Judge Cooper's sentence of Rivera was that "Rivera has one of the ugliest probation reports of a worthless human being who has bummed his way to cheap pursiuts—gaming, dice, trickery, fraud, cheap behavior, and then one of the spearheads of this counterfeiting plot." (Tr. 1685) It follows that his sentencing was entirely proper.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the Southern District of New York, Attorney for the United States of America.

MICHAEL S. DEVORKIN,
FREDERICK T. DAVIS,
Assistant United States Attorneys,
Of Counsel.

★ U. S. Government Printing Office 1976—614—350—664

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Michael S. Devorkin being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 7th day of June , 1976, he served ~~a~~ 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

1. Victor J. Herwitz, Esq.
22 East 40th Street
New York, N.Y. 10016

2. Ralph S. Naden, Esq.
253 Broadway
New York, N.Y. 10007

And deponent further says that he sealed the said envelopes and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.,

and hand delivered two copies of the said brief to The Legal Aid Society, 509 U.S. Courthouse, Foley Square, New York, N.Y.

Michael S. Devorkin

Sworn to before me this 7th day of June, 1976

Jeanette Ann Grayer

JEANETTE ANN GRAYER
Notary Public, State of New York
No. 24-1341-75
Qualified in Kings County
Commission Expires March 30, 1977